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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VANCE NILSEN, *Petitioner*

v.

ROBERT BORG, ET AL., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

SUPPPLEMENTAL APPENDIX: OPINION OF THE DISTRICT COURT

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February 20, 1995

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VANCE NILSEN, Petitioner, v. ROBERT G. BORG, Warden, Respondent.	No. C-90-1215-DLJ **ORDER**

Petitioner Vance Nilsen, who is incarcerated at Folsom State Prison, filed a petition for a writ of habeas corpus on April 25, 1990.[1] Now before the Court are cross-motions for

[1] Petitioner filed a separate habeas petition with a California superior court in early February, 1993, containing substantially the same claims now brought before us. Petitioner indicated he is "prepared and willing to dismiss that writ forthwith if the issue...can be determined in [this] court at this time." Second Amended Habeas Petition (hereinafter "Petitioner's Mot. for Summ. J.") at 4.

summary judgement on petitioner's claims, which are founded largely on a recent confession by petitioner of limited involvement in the murder for which he was convicted. At a hearing before the Court on October 6, 1993, petitioner was represented by Kent A. Russell of Russell & Russell, and responded by California Deputy Attorney General David D. Salmon.

I. BACKGROUND

The factual background and procedural history relating to petitioner's conviction are detailed extensively in our Order of April 5, 1993, which is deemed incorporated herein. In that Order, we found petitioner's state remedies exhausted and ordered respondent to file an answer to the habeas petition. Following that Order, petitioner submitted a second amended habeas petition, and respondent answered by seeking our denial of that petition. The Court ordered inter alia that the submitted pleadings would be treated as cross-motions for summary judgment and that petitioner's request for an evidentiary hearing was denied pending summary judgement. See Order, August 10, 1993.

Petitioner raises three claims in this habeas petition: his right of confrontation was abrogated; his right to effective

assistance of trial and appellate counsel was denied; and, the submitted jury instruction which led to his conviction were violative of due process.

A. Confrontation Clause

Petitioner claims the trial court's exclusion of certain evidence constituted a violation of his right of confrontation. Petitioner's allegations in this regard fall into three categories:

1. Psychiatric Evidence of Trejo's Disorders

Petitioner alleges that damaging hearsay declarations, purportedly made by Trejo prior to her disappearance, were allowed before the jury. Petitioner does not specify precisely which statements he alleges were erroneously introduced at trial.

Petitioner also claims the trial court erred by excluding vitally important psychiatric impeachment evidence. The trial court disallowed evidence that, at age thirteen, Trejo was placed under psychiatric care and supervision at the Finch School with other emotionally disturbed children. Petitioner sought to introduce records kept at the school and obtained by trial counsel in order to impeach the credibility of defendant's hearsay declarations, to demonstrate Trejo's purported sexual perversions, and to provide alternate

theories as to how Trejo might have met her death. Petitioner's Mot. for Summ. J. at 16. Those records include analyses that Trejo had "clear indications of an underlying schizophrenic process" and a "sexual identity problem" which involved Trejo's "wanting to cut off her breasts and have a sex change operation." Id. at 17. According to petitioner, this evidence would have cast doubt ont eh prosection's portrayal of Trejo as "a normal teenage girl whose only sexual dysfunction came through her relationship with petitioner." Id. at 18.

Petitioner also alleges error in the trial court's exclusion of the testimony of two psychiatric experts. These experts, familiar with the school records discussed above, were prepared to testify that Trejo: was a schizophrenic; had a manifest disturbance in her sexual identity that was exemplified in sexually masochistic fantasies; had a strong death wish and suicidal fantasies; and , was prone to hallucination and fabrication.

According to petitioner, the denial of cross examination of the hearsay declarations and the exclusion of expert testimony prevented the jury from considering that "any number of the objects of her sexual fantasies--or even Trejo

herself--could have been responsible for her death." Id. at 19.

2. Evidence of Other Sexual Relationships and Practices of Trejo

Petitioner alleges the trial court improperly excluded evidence of Trejo's purported acts of sex and deviant behavior with others. Id. at 19-20. Included in this alleged cache of improperly excluded evidence are allegations that Trejo: associated with street gangs and common muggers during the summer of 1983; was seen taking drugs frequently, including shooting heroin; had various boyfriends and sexual partners; and, was involved in a satanic cult. Id. at 19-22.

3. Psychiatric and Other Evidence Pertaining to Joanne Nilsen's Purported Emotional Disease and Homicidal Impulse

Petitioner alleges the trial court erred in excluding psychiatric evidence pertaining to petitioner's former wise, which could have impeached her credibility. Petitioner alleges that, by allowing the sensational and prejudicial testimony of petitioner's former wise, and then disallow evidence of her mental illnesses, petitioner was unduly prejudiced.

Petitioner first argues the trial court erroneously excluded evidence that Joanne Nilsen suffered from conditions that constituted either a "paranoid disorder" or "paranoid psychotic

manifestations in a borderline personality." Id. at 23. Second, combined with this alleged instability, petitioner asserts error in the exclusion of expert testimony that Joanne Nilsen's history of engaging in group sex, and her having been raped, "affected her ability to perceive in a sexual context." Id. According to petitioner, this exclusion as particularly prejudicial because it precluded (1) a meaningful challenge to JOanne Nilsen's assertion that petitioner had inserted an unloaded gun in her vagina and pulled the trigger six times, and (2) a determination of whether the event truly was "similar" for purposes of calculating its admission as evidence. Id. at 22.

The defense also alleges trial court error in refusing petitioner access to Joanne Nilsen's psychiatric records during her institutionalization for serious emotional disorders, id. at 23, and in failing to review these records in camera. Id. at 24.

B. Ineffective Assistance of Counsel

The gravamen of petitioner's habeas claim and motion for summary judgment consists of a newly disclosed confession by petitioner. This new information mirrors the conte\nts of a letter sent by petitioner to the victim's mother in February of 1992, and constitutes the bulk of petitioner's ineffective

assistance of counsel claim. Petitioner claims that, in contradiction to the defense developed at his trial, he was present at the death of the victim, Beth Trejo. Petitioner claims that Trejo sought his assistance in committing suicide, and that petitioner went through the acts of assisting in Trejo's suicide "in order to demonstrate to the decedent that she did not in fact really want to commit suicide..." Petitioner's Mot. for Summ. J. at 4. Due to intoxication, however, petitioner claims he negligently failed to prevent the suicide from taking place, and then unsuccessfully attempted to resuscitate petitioner. Id. Only following her death, according to petitioner, did he inflict the various wounds on Trejo's body.

Petitioner claims he advised his trial attorney, James Robert Courshon, of his involvement with Trejo's death, and that Courshon initially agreed to base petitioner's defense on those facts. Id. However, according to petitioner, counsel later elected to pursue a different strategy. Id. After the trial had commenced, petitioner realized he could not testify in support of the defense being presented without perjuring himself. Id. Upon advising counsel he would not lie under oath, petitioner followed counsel's advice not to take the stand. Id.

Petitioner's ineffective assistance of counsel claim is

pleaded also as to petitioner's appellate counsel, Andrew Parnes, petitioner asserts the ineffective assistance of counsel claim was not raised on petitioner's direct appeal because Parnes had "concurred in the strategy pursued by trial counsel, and went along with it on appeal." Id. at 13. In fact, petitioner claims he also revealed to Parnes his involvement in Trejo's suicide, but was told his only legal option was to fight the case he had been "struck" with by the trial counsel's strategy. Id. at 13, 33. The consequent omission by appellate counsel of this argument creates, according to petitioner, a separate basis for asserting the ineffective assistance of counsel claim against his appellate counsel. Id. Although petitioner did raise a generic species of the ineffective assistance of counsel argument in state collateral proceedings, that argument did not involve the claim that petitioner was given the ultimatum of testifying falsely or not at all. Id. at 14.

Petitioner also alleges the ineffective assistance of counsel in other ways. Petitioner argues that despite "[going] through the motions," Id. at 25, the defense ultimately failed to suggest an alternate explanation for Trejo's death other than that presented by the prosecution. "Thus petitioner never

had a fair chance to defend himself..." Id. Petitioner alleges this result was the product of: (1) the defense losing its credibility by questioning the identity of the decedent, despite that verification being conclusively established by acknowledged experts; (2) the defense not obtaining substantial, available evidence of multiple cases of vaginal gunshot wounds and the non-sadistic motives for the shootings; (3) the defense not introducing actual evidence of the millions of .22 caliber weapons that could have been used to shoot the decedent; (4) defense counsel failing to explain to petitioner the serious risks of failing to testify in this type of case, and then telling at mid-trial petitioner it was "too late" to testify; (5) defense counsel admitting to petitioner and numerous witnesses that he had been inadequate; (6) no family witnesses being called by the defense to rebut allegations that petitioner was not a sado-masochist; (7) defense counsel failing to have an expert testify as to the cause of death, and (8) defense counsel's failure to make a record to establish the existence of Griffin error during the prosecution's closing statement. Id. at 25-35.

Petitioner also argues that the factors listed above constitute actual prejudice. Petitioner acknowledges that those

aspects of the case pointing either to petitioner's possible innocence or the dubiety of petitioner's guilt are now rendered weaker or altogether useless in the wake of his recent confession. See Respondent's Mem. of P. & A. in Resp. to Answer and Return at 5. Notwithstanding, petitioner specifies certain issues which allegedly support his claim of harmful error--(1) the failure of counsel to present the case of, and to allow petitioner to take the stand concerning, petitioner's asserted innocence led to the pursuit of an "all-or-nothing strategy [which] exposed petitioner to a life-without-parole sentence in the likely event that the jury did not accept the [innocence] defense..." Petitioner's Mot. for Summ. J. at 47; (2) the cross-examination sought by petitioner affects resolution of the question whether Trejo committed suicide, Petitioner's Mem. of P. & A. in Resp. to Answer and Return at 5; and (3) the argument that Joanne Nilsen's testimony about the "similar" should have been excluded, limited or subjected to impeachment, impacts issues of intent and torture. Id.

C. Alleged Denial of Due Process in Jury Instructions on Torture

Petitioner claims error in the submission of jury instructions which enabled the jury to find petitioner guilty of

murder by torture without specifically finding the acts of torture premeditated and deliberate, the cause of extreme and prolonged pain to a living victim, and the actual cause of death. Petitioner's Mot. for Summ. J. at 49. Petitioner claims the instructions actually submitted have been subsequently revised and that because the given instructions did not require the jury to find, beyond a reasonable doubt, the existence of each of the elements of the crime and special circumstance, a violation of federal law occurred. Petitioner's Mem. of P. & A. in Resp. to Answer and Return at 6. Moreover, since a finding by the jury of the special circumstance mandates at least the imposition of a sentence of life without possibility of parole, petitioner asserts an actual prejudice. Petitioner Mot. for Summ. J. at 49.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication where " the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving

for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in rule 56, 'specific facts showing that there is a genuine issue for trial.'" T.W. Electric Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1983); Kaiser Cement Corp. v. Fischback & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 107 S.Ct. 435 (1986) (emphasis in original).

On cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof they will face at trial. To succeed on summary judgment, a plaintiff must prove each element essential to the claims upon which he seeks judgment by undisputed facts. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (party with burden "must establish beyond peradventure all of the essential elements..." (emphasis original)). In an influential article, Judge Schwarzer phrased plaintiff's burden as follows: "Where the moving party has the burden [of proof at

trial...,] his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-488 (1984).

In contrast, a defendant's motion for summary judgment faces a lighter burden. Because the defendant does not bear the burden of proof at trial, the defendant need only point to the insufficiency of the plaintiff's evidence to shift the burden to the plaintiff to shift the burden to the plaintiff to raise genuine issues of fact as to each claim by substantial evidence. T.W. Electric Service, Inc. v. Pacific Elec. Contractors Assoc, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1983); Kaiser Cement Corp. v. Fischback & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 S.Ct. 949 (1986). If plaintiff fails to raise a genuine issue of fact, then summary adjudication in favor of the defense will be granted.

When judging the evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the nonmoving party.

T.W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356 (1986)); Ting v. United States, 927 F.2d 1509 (9th Cir. 1991). Regardless of who is the moving party, each party must "establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex Corp., 106 S.Ct. at 2552. The Standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512 (1986).

In meeting their burdens of proof, each party must come forward with admissible evidence. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving paper is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.ed 49 (2nd Cir. 1985); Thomhill Publishing Co. v. GTE Corp., 594 F.2d 759, 762-63 (9th Cir. 1980). Plaintiffs must ultimately persuade the Court in opposing summary judgment that they will have sufficient

admissible evidence to justify going to trial.

III. DISCUSSION

A. Right of Confrontation Claims

1. Petitioner Alleges Violations of His Right of Confrontation Which, Even If True, Do Not Constitute Prejudice

Petitioner claims various trial court rulings concerning the admissibility of certain evidence violated his right of confrontation. An inquiry into the prejudice vel non resulting from the alleged error--positing for a moment the truth of petitioner's allegations--obviates the need for analysis of error; many of these "errors" would be harmless beyond peradventure.

While habeas petitioners may obtain plenary review of their constitutional claims, habeas relief is unavailable in the absence of proof of "actual prejudice." Brecht v. Abrahamson 113 S.Ct. 1710, 1722 (1993). Questions of prejudice on collateral review are resolved by addressing whether the trial court error "had substantial and injurious effect or influence in determining the jury's verdict." Id. (rejecting on collateral review standard under which state would be required to prove asserted error was "harmless beyond a reasonable doubt"). Moreover, the burden is ont he habeas petitioner, and not the state, to make such a showing. Id. This analysis involves more

than a limited determination of how the error might have affected the jury's verdict, but requires an assessment of what the error meant in relation to all else that happened during the trial. See Brecht, 113 S.Ct. at 1724 (J. Stevens concurring) (citing Kotteakos, 66 S.Ct. at 1248).

As a threshold matter, those arguments now raised by petitioner which present a challenge to his involvement in Trejo's death are moot. See supra at 8; Respondent's Mem. of P. & A. in Supp. of Answer and Return at 1; Petitioner's Mem. of P. & A. in Resp. to Answer and Return at 5. Falling in this category is much of that evidence evincing Trejo's background, which petitioner now challenges.

a. Hearsay Statements of Trejo

Petitioner does not specify precisely which statements he alleges were erroneously introduced at trial. Taken together, however, those statements purportedly assisted in establishing Trejo's state of mind as to the existence and purpose of her visit to petitioner the night she died--to engage in sado-masochistic sex with petitioner. Respondent's Answer and Return to Order to Show Cause (hereinafter "Respondent's Mot. for Summ. J.") at 5. Admissions of these statements aided the jury in finding precisely what petitioner now admits--his

presence and involvement with Trejo on the night of her death. Any arguable error in the admission of such hearsay evidence is harmless, since the alleged trial error cannot be said to have had "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S.Ct. at 1722.

b. Sexual Relationships and Practices of Trejo

Petitioner also alleges error in the exclusion of evidence concerning Trejo's "sexual activity and contacts with extremely unsavory persons and settings which would have furnished alternate explanations for how Trejo came to her death..." Petitioner's Mot. for Summ. J. at 20. Again, the trial court's ruling was not prejudicial; any such evidence which might have supported allegations concerning third persons' involvement in Trejo's death is mooted by petitioner's confession that he and Trejo were unaccompanied on the night of her death. Moreover, to the extent petitioner alleges this exclusion prejudiced him by excluding the inference that Trejo killed herself, there is no sufficient nexus between claims of excessive or deviant sexual activity and suicidal tendencies to qualify that evidence as relevant. Again, any arguable error in the omission of such hearsay evidence cannot be said to have had "substantial and injurious effect or influence in determining the jury's verdict."

Brecht, 113 S.Ct. at 1722.

c. Records and Psychiatric Testimony Concerning Joanne Nilsen

Petitioner also claims error in the trial court's handling of evidence pertaining to Joanne Nilsen's background and credibility. The key item of evidence alleged to have been erroneously introduced--the gun-in-vagina incident--was certainly not prejudicial. Such evidence was sought and introduced for the purpose of establishing the similarity of that event to the manner in which Trejo was maimed. REspondent's Mot. for Summ. J. at 15. As correctly found by a California court of appeal, Joanne Nilsen's testimony went primarily to the question of petitioner's identity as the murder suspect. People v. Nilsen, No. A032808, slip op. at 69 (Cal.Ct.App. Feb. 24, 1988). Any possible prejudice is therefore mooted by petitioner's later confession, and cannot be said to have had "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S.Ct. at 1722.

Petitioner's other evidentiary arguments pertaining to limitations on testimony evincing Joanne Nilsen's psychiatric background and the trial court's denial of access to discover Joanne Nilsen's psychiatric records, also go ultimately to the

question of identity. Petitioner contends exclusion of this evidence prejudiced him since the omitted evidence would have affected issues of intent and torture. Petitioner's Mem. of P. & A. in Resp. to Answer and Return at 5. However, given (1) the Court of Appeal's finding that Joanne Nilsen's testimony addressed primarily the issue of identity, Respondent's Mot. for Summ. J. at 15, (2) that the omitted testimony speaks only incidentally, if at all, to the question of intent and torture, and (3) that substantially similar material was available with which to impeach Joanne Nilsen at trial, see id. at 15, n.3, the omitted testimony did not cognizably prejudice petitioner. Accordingly, these pieces of evidence, challenged as either erroneously admitted or omitted, did not constitute prejudice even if improperly decided below.

2. Petitioner's Remaining Claims of a Violation of His Right of Confrontation are Without Merit

Without directly addressing the prejudice question with regard to petitioner's remaining evidentiary objections, [2] it is

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[2] Although we directly address the merits of these claims, it appears likely that trial court error on these rulings would not, in any event, have prejudiced petitioner. Petitioner asserts the exclusion of this evidence was prejudicial because it denied meaningful cross-examination on the issue whether Trejo had committed suicide. Petitioner's Resp. to Answer and Return to Show

clear that those evidentiary challenges are without merit. Each remaining trial court ruling contested by petitioner involves a decision properly within the discretion of the trial court.

Trial judges retain "wide latitude" in limiting cross-examination based on concerns including harassment, prejudice, confusion of the issues and interrogation "that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 106 S.Ct. 1431, 1435 (1986). "[T]he Confrontation Clause guarantees an opportunity for effective examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 106 S.Ct. 292, 295 (1985).

a. Alleged Error in Excluding Psychiatric Records Pertaining to Trejo

Petitioner first challenges the exclusion of records discovered from the Finch School relating to Trejo's psychiatric history. The trial court excluded this evidence upon an examination of the records, concluding the records contained no

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Cause at 5. It cannot be asserted that introduction of evidence concerning Trejo's psychiatric problems at a younger age would have reasonably enabled a jury to conclude Trejo had committed suicide, given the inability of counsel to locate an expert who would testify that neither of the wounds was inflicted ante-mortem. Accordingly, it cannot be said that inclusion of this evidence affected the outcome of the trial. See Brecht, 113 S.Ct. at 1722.

indication of the source of the clinical social workers' psychiatric history, that most of the information consisted of comments made by social workers when Trejo was thirteen years old, and that little of it was traceable to a psychiatrists's evaluation. Respondent's Mot. for Summ. J. at 6. The relevance of these records to Trejo's state of mind three years later is uncertain to begin with, and particularly case into doubt by other records which document changes Trejo underwent during her twenty months at the school. See, id. Accordingly, the reliability and probativity of this evidence places its exclusion squarely within the discretion of the trial court.

b. Alleged Error in Excluding Expert Testimony Pertaining to Trejo

Petitioner also challenges the exclusion of the psychiatric evaluation of two experts. Petitioner had attempted to use the testimony of these experts to diagnose Trejo's psychiatric state of mind. As neither expert had met Trejo, the anticipated testimony would have been based primarily on the experts' studies of the Finch School records. Id. at 8. Given the Court's holding that the exclusion of the Finch School records was proper, this claim fails a fortiori, since the expert testimony would have been based on properly excluded evidence.

B. Ineffective Assistance of Counsel Claims

1. Petitioner's Contention that the Defense Offered Ineffective Assistance in Failing to Argue Petitioner's Defense of Limited Participation in the Crime

Petitioner's claim fails to meet either of the two predicate elements for a claim of ineffective assistance of counsel. In Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984), the Supreme Court held that a party must establish (1) that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment" and (2) "that these errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Although Herrera v. Collins, 113 S.Ct. 852 (1993), held that a state court finding of guilt cannot be relitigated in a federal collateral proceeding, the present claim is not barred by that ruling. Claims of actual innocence pleaded in the context of an alleged, independent constitutional violation are cognizable on collateral review. Id. at 860. Here, petitioner's claim is viable because his admission of limited involvement is relevant not to assess his innocence per se, but to determine whether he received prejudicial and ineffective assistance from his trial or appellate counsel. See Respondent's Mot. for Summ. J. at 26.

Petitioner's claim of ineffective assistance of counsel fails

because he cannot prove, on the basis of an objective standard, that counsel failed to competently select petitioner's defense in light of what he was told by petitioner and learned from investigation.[3] Strickland, 104 S.Ct. at 2066. In ascertaining whether counsel's assistance was effective, a court's scrutiny must be "highly deferential." Id. at 2065. "It is all to tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

The choice by counsel at trial and on appeal not to defend petitioner on the basis of limited involvement in Trejo's death was not incompetent. One way of characterizing petitioner's argument is that counsel acted ineffectively in portraying him before a jury as entirely innocent when instead, counsel should

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[3] It is worth mentioning marginally that petitioner's claim of innocence is highly problematic. To date, he has not located an expert who would offer an opinion favorable to his position that the torturous wounds were inflicted post-mortem. Respondent's Opp'n to Petitioner's Mot. for Summ. J. at 1. Petitioner merely offers his own opinion that another expert, having been informed that petitioner attempted to resuscitate Trejo after he death, might have offered a more favorable opinion. Id. at 9, n.l.

have asserted he was only partially innocent. As respondent argues, it is an attorney's duty to attempt an effective defense even where his client is guilty. While an attorney is ethically and legally barred from presenting false evidence or counselling perjury, no case has been cited finding incompetent or unethical the presentation of a defense that denies the guilt of a guilty defendant, and puts to the prosecution its burden of proof. See Respondent's Opp'n to Petitioner's Mot. for Summ. J. at 6.

Looking specifically to the defense offered by petitioner's trial and appellate counsel, it is apparent petitioner was afforded a meaningful legal defense. As respondent convincingly argues, trial counsel and appellate counsel competently selected petitioner's defense in light of what they learned from petitioner and their investigations. Both the prosecution's expert and the expert consulted for the trial defense agreed that at least one of the wounds inflicted on Trejo was antemortem. Id. at 10. Accordingly, if the defense could not find some basis for discrediting these expert conclusions, then petitioner's claim of limited involvement was, at the least, a nearly insurmountable task of proof, and at the most, false. See id. Given this background, counsel provided petitioner

with a reasonable defense.

Moreover, as respondent persuasively argues, four aspects of petitioner's defense, objectively looked at on the eve of trial, indicate that defense counsel elected to pursue an intelligent strategy. First, the issue of identity was open to challenge, since there was no direct evidence linking petitioner to the crime. Id. Second, a significant item of evidence sought to be introduced by the prosecution--the "similar" act of inserting a gun in Joanne Nilsen's vagina- - was open to meaningful challenge given her bias and her history of psychiatric treatment. Id. Third, there was the reasonable hope for petitioner that the court would exclude the hearsay statements of Trejo which depicted a sexually deviant relationship with petitioner. Id. Finally, Trejo's mother and aunt believed, on the basis of a tape recording of what they would testify they thought was Trejo's voice, that she was still alive. Id. Accordingly, petitioner's claim of ineffective assistance of counsel must fail because petitioner has not met his burden of proving counsel provided him with a defense that was objectively deficient. Under a "highly deferential" scrutiny, counsel did not make "errors so serious that [they were] not functioning as the 'counsel' guaranteed by the Sixth Amend-

ment." Strickland, 104, S.Ct. at 2064.

Even were we to find that petitioner stated a viable claim of ineffective assistance of counsel, petitioner would nonetheless fail to convince the Court that such ineffective assistance prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 104, S.Ct. at 2068.

Counsel's failure to defend petitioner on grounds of limited involvement in Trejo's death, even if accurately described as error, does not result in prejudice to petitioner. Had counsel defended petitioner on the grounds of limited participation purportedly suggested by petitioner, the defense would have approximated the following script: Some time before her death, Trejo began seeking petitioner's assistance in committing suicide; petitioner first resisted such ideas, and then, merely "to placate her", routinely began to help Trejo commit suicide; following a day of heavy drinking, petitioner met with Trejo on the night of December 30, 1983, where they began acting out a pseudo-suicide scene; petitioner then left Trejo momentarily for a drink, and discovered upon returning that she had committed

suicide by suffocating herself; failing in his attempts to revive Trejo, petitioner proceeded to stab Trejo's corpse, fire a gun into Trejo's vagina and dismember her corpse; petitioner then "made the further mistake of trying to cover it up." Letter from Petitioner to Mrs. Margie Trejo of Feb. 10, 1992, Petitioner's Supplemental Expanded Record, Ex. 102.

Compounded with the patent incredibility of this narrative, the presentation of such a defense would have incurred other obstacles: (1) all scientific evidence presented to the Court to date indicates at least one of the wounds was inflicted ante-mortem, such that a confession that petitioner was responsible for the wounds would have been tantamount to a confession of first degree of first degree torture-murder; (2) had petitioner testified and denied he was a sexual sadist, the prosecution likely would have impeached him with Trejo's diaries detailing their sado-masochistic relationship; (3) had petitioner offered his current wife's testimony as to the normalcy of their sexual relationship, petitioner could have been impeached by her own admissions that their relationship involved the practice of simulated rape, and could have been made to explain his recent rental of a "Snuff" film. See Respondent's Mot. for Summ. J. at 30-31. Collectively, these factors make clear that

petitioner suffered no demonstrable prejudice in not presenting his theory of limited involvement in Trejo's death does not create a reasonable probability "sufficient to undermine confidence in the outcome" of the trial. Strickland, 104 S.Ct. at 2068.

2. Petitioner's Other Claims of Ineffective Assistance of Counsel

Petitioner also claims ineffective assistance of counsel as the result of a number of alleged trial counsel errors: (1) the defense losing its credibility by questioning the identity of the decedent, despite that verification being conclusively established by acknowledged experts; (2) the defense not obtaining substantial, available evidence of multiple cases of vaginal gunshot wounds and the non-sadistic motives for the shootings; (3) the defense not introducing actual evidence of the millions of .22 caliber weapons that could have been used to shoot the decedent; (4) defense counsel failing to explain to petitioner the serious risks associated with failing to testify in this type of case, and then telling petitioner at mid-trial it was "too late" to testify; (5) defense counsel admitting to petitioner and numerous witnesses that he had been inadequate; (6) no family witnesses being called by the defense to rebut

allegations that petitioner was not a sao-masochist; (7) defense counsel failing to have an expert testify as to the cause of death, and to establish that petitioner was not a sexual sadist; and (8) defense counsel's failure to make a record to establish the existence of Griffin error during the prosecution's closing statement. Id. at 25-35. In each of these instances, the Court finds there was neither error committed by counsel, nor any cognizable prejudice accruing to petitioner.

a. Petitioner's Claim that the Defense Lost Its Credibility By Questioning the Identity of the Decedent

Petitioner alleges the defense lost its credibility by questioning the identity of the decedent, despite that verification being conclusively established by acknowledged experts. This challenge fails because, as mentioned above, there was no direct evidence linking petitioner to the crime. Additionally, Trejo's mother and aunt believed,on the basis of a tape recording of what they would testify they thought was Trejo's voice, that she was still alive. Respondent's Opp'n to Petitioner's Mot. for Summ. J. at 10. Therefore, counsel's decision to challenge the identity of the decedent cannot be deemed unreasonable under Strickland.

b. Petitioner's Claim that the Defense Erred in Not

Introducing Actual Evidence of the vast Number of .22 Caliber Weapons That Might Have Been Used to Shoot Defendant

Petitioner claims the defense erred in not introducing actual evidence of the millions of .22 caliber weapons that could have been used to shoot the decedent. Given petitioner's confession of limited involvement, this argument is rendered moot insofar as it implicitly asserts petitioner's innocence. Compare Respondent's Mem. of P. & A. in Supp. of Answer and Return at 1; Petitioner's Mem of P. & A. in Resp. to Answer and Return at 5.

c. Petitioner's Claim that Trial Counsel Erred in Not Obtaining General Evidence Pertaining to Vaginal Gunshot Wounds

Petitioner his trial counsel erred in not obtaining substantial, available evidence of multiple cases of vaginal gunshot wounds and the non-sadistic motives for the shootings. Petitioner is mistaken in his facts; trial counsel elicited an expert opinion that vaginal gunshot wounds, though uncommon, are not unique, and occur with a predictable frequency. Respondent's Ex. S at 4. The expert further testified that San Francisco averaged about two such incidents annually, and that the previous year witnessed six homicides involving such wounds. Respondent's Mem. of P.& A. in Supp. of Answer

and Return at 35; RT 2230. Perhaps more significantly, since petitioner's trial defense was premised on his asserted innocence, it would have been anomalous and prejudicial to petitioner to have emphasized t o the jury the frequency and non-sadistic motives in inflicting such wounds.

d. Petitioner's Claim that Trial Counsel Erred in Failing to Explain to Petitioner the Serious Risks of Failing to Testify

Petitioner claims defense counsel erred in neglecting to explain to him the serious risks associated with failing to testify in this type of case, and in then telling petitioner at mid-trial it was "too late" to testify. A chronicle of those instances during the trial in which petitioner elected to testify and not to testify well illustrates that he was fully informed of the strategic advantages and shortcomings in testifying. According to petitioner's version of the events, petitioner first decided to testify "falsely" as to his non-involvement in the crime; then, upon realizing he would be required to perjure himself, petitioner opted not to testify. See Respondent's Mem. of P. & A. in Supp. of Answer and Return at 42. Following completion of the prosecution's rebuttal, petitioner investigated with the court as to his involvement in Trejo's death. Id. at 42-43. Petitioner concluded he would not testify. Id. at 43-44. When

the defense finally rested, petitioner again changed his mind and told trial counsel he wanted to testify. Once again, after discussing the likely effect of petitioner's anticipated testimony under direct and cross-examination, petitioner concluded he would not testify. Id. at 44.

These facts alone indicate the decision ultimately not to testify was made knowingly. Moreover, the factual backdrop against which petitioner chose whether or not to testify makes clear his final decision was made wisely; petitioner's proposed testimony would have confronted countless obstacles at cross-examination,a s respondent has forcefully argued. See Respondent's Mem. of P. & A. in Supp. of Answer and Return at 45.

e. Petitioner's Claim that Trial Counsel Admitted Inadequate Performance as Trial Counsel

Petitioner claims defense counsel admitted inadequacy in its representation of petitioner. As a threshold matter, trial counsel's remarks have been taken somewhat out of context. See Respondent's Ex. S at 11-14. More importantly, however, an assertion by trial counsel as to his own incompetence is of little value in assessing whether counsel's performance was truly constitutionally deficient. Were a court to give controlling

effect to such an admission, "then the attorney's strategy [would] creates a foolproof defense...We cannot allow such schemes to succeed." Toomey v. Bunnell, 898 F.2d 741, 744 & n.2 (9th Cir. 1990) (no prejudice where counsel apparently violated ethical rules to enable client to succeed on appeal). The appropriate inquiry in an ineffective assistance of counsel analysis is not what an attorney thought of his own performance, but rather, as the Court has discussed above, what an objective, competent attorney would have done under like circumstances. Supra at 18; see also Strickland, 104 S.Ct. at 2064.

f. Petitioner's Claim that Trial Counsel Erred in Failing to Call Family Witnesses

Petitioner claims trial counsel erred in failing to call to the stand family witnesses to rebut allegations that petitioner was a sado-masochist. Had petitioner's current wife, Janis Nilsen, taken the stand in petitioner's trial, her testimony concerning the couple's "tender and gentle" sex life could have been seriously undercut by reference to petitioner's subsequent confession of inflicting the vaginal gunshots and dismembering Trejo's body. See Respondent's Mem. of P. and A. in Supp. of Answer and Return at 40. Moreover, trial counsel claims he learned facts

from Janis Nilsen which belie her assertions of a "normal" sex life. For example, the petitioner and Janis Nilsen acted out a fantasy in which petitioner would crawl in through their window and simulate raping Janis Nilsen. Id. at within the range of professional competence.

g. Petitioner's Claim that Trial Counsel Erred in Failing to Have an Expert Testify as to Trejo's Cause of Death

Petitioner claims that defense counsel erred in failing to have an expert testify as to Trejo's cause of death, and to establish that petitioner was not a sexual sadist. In fact, trial counsel did consult experts on both of these topics. Three experts concurred in the opinion that at least one of the wounds inflicted on Trejo was done so pre-mortem. See Petitioner's ex. 15 at 1006; Respondent's Ex. S; RT 136, 140-41. To this date, in fact, petitioner has not located an expert willing to testify that neither of the wounds was inflicted prior to Trejo's death. Respondent's Reply at 5.

Concerning petitioner's denial he was a sexual sadist, trial counsel in fact retained the services of an expert to consider the matter. Upon examining both petitioner and Janis Nilsen, Dr. Donald Lunde, a psychiatrist at Stanford University, advised trial counsel he would be unable to support petition-

er's claim he was not a sexual sadist. Trial counsel met any obligation of diligent investigation and acted competently in electing not to offer expert testimony that petitioner was not a sexual sadist.

h. Petitioner's Claim that Trial Counsel Erred in Failing to Make a Record to Establish the Existence of Griffin Error

Petitioner claims counsel committed error in failing to make a record to establish the existence of Griffin error during the prosecution's closing argument. Petitioner specifically argues that trial counsel failed to make an adequate record to show that the prosecutor pointed at petitioner in arguing to the jury that "he" had not explained the letter he sent to Trejo's aunt about January 4, 1984, which contained petitioner's fingerprint.[4] In fact, defense counsel did object. RT 2170. Moreover, petitioner has not shown how any arguable incompetence in failing to make a better record has resulted in prejudice to petitioner.

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[4] The letter, written in what appeared to be Trejo's handwriting, stated Trejo was moving to New York because her life in California had been unhappy and because she was seeking a new identity. The letter further stated Trejo would call her aunt and mother the following Christmas. See Order, April 5, 1993. In his recent confession, petitioner admits sending this letter. See Letter from petitioner to Mrs. Margie Trejo of Feb. 10, 1992, Petitioner Supplemental Expanded Record, Ex.

In sun, each of these assertions of ineffective assistance of counsel falls into that class of claims which do not amount to an unreasonable choice of strategy, or an insufficient pursuit of diligence under Strickland. In addition, it would be difficult to find the type of prejudice cognizable under Strickland in any of the above allegations.

C. Jury Instructions

Petitioner claims that two of the instructions submitted to the jury--concerning first degree murder by torture, and the special circumstance finding of intentional torture--effected a deprivation of his constitutional rights. Specifically, petitioner claims error in the submitting of instructions which enabled the jury to find petitioner guilty of murder by torture without finding (1) that the acts of torture were premeditated and deliberate, (2) that they caused extreme and prolonged pain to a living victim, and (3) that these acts were the actual cause of death. Petitioner's Mot for Summ. J. at 49. Petitioner claims the instructions actually submitted have been subsequently revised, and provides citation to the current version of California Jury Instructions, Criminal (CALJIC). In raising claims for failure to properly instruct the jury, an alleged error of state law does not state a claim cognizable on federal habeas

corpus review. Engle v. Issac, 456 U.S. 107, 119 (1982); Walker v. Endell, 850 F.2d 475-76 (9th Cir. 1987). To obtain collateral relief for error in the jury charge, a petitioner must show the ailing instructions so infected the entire trial that the resulting conviction violates due process by rendering the trial fundamentally unfair. Estelle v. McGuire, 112 S.Ct. 475, 482 (1991).

Petitioner alleges a constitutional violation on the premise that he instructions did not require the jury to find the existence of each of the elements of the crime and special circumstances beyond a reasonable doubt. Petitioner's Mem. of P. & A. in Resp. to Answer and Return at 6. Moreover, since a finding by the jury of the special circumstance mandates at least the imposition of a sentence of life without possibility of parole, petitioner asserts an actual prejudice. Id. at 49.

Wile any such violation likely would constitute prejudice, we need not reach that question here, since the jury instructions actually given do not violate due process. Petitioner's argues:

> In the instance case, the instructions actually given to the jury were later modified by the California Judicial Council to add elements omitted by the prior instructions. Although this is not necessarily equivalent to a finding that the jury instructions given at petitioner's trial were deficient,

> because the CALJIC modifications were based on California Supreme Court cases which defined and clarified the law in effect at the time of petitioner's trial the CALJIC modifications were based on California Supreme Court cases which defined and clarified the law in effect at the time of petitioner's trial, the CALJIC modifications tend to illustrate how gaps in the instructions actually given may have given rise to Winship/Sandstrom error.

Petitioner's Mem. of P. & A. in Resp. to Answer and Return at 16. Petitioner additionally argues, later in his brief, that "it is far from clear that the jury was properly instructed in this case as a matter of California law." Id. at 20.

These two arguments fail. Initially, the jury instructions actually given to petitioner were found by a California court of appeal to conform to California law. Respondent's Mot. for Summ. J. at 16. Moreover, as a matter of federal law, it cannot be successfully argued that modifications of jury instructions, in the conceded absence of any deficiency in those instructions, constitutes a deprivation of federal due process. The CALJIC instructions are not authoritative instructions of state law, but reflect only the interpretations of California law given by the Committee on Standard Jury Instructions, Criminal, of the Los Angeles Superior Court. See Respondent's Mot. for Summ. J.

at 16.[5] Accordingly, in the absence of any failing in the submitted jury instructions, respondent's motion for summary judgment on this claim is granted.

IV. CONCLUSION

The Court grants respondent's motion for summary judgment, and denies petitioner's motion for summary judgment, on all claims. Petitioner's request for an evidentiary hearing is also denied, as unnecessary following today's decision. The Court accordingly ORDERS as follows:

1. Petitioner's motion for summary judgment is DENIED.

2. Respondent's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Dated: November 29, 1993.

s/ **D. Lowell Jensen**
United States District Judge

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[5] Moreover, a modification of jury instruction by CALJIC does not necessarily reflect a belief by its authors that the former instructions was legally deficient.